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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF NEVADA**  
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9 RALPH SCHNEIDER,  
10

11 *Petitioner,*

12 vs.

13 E.K. MCDANIEL, *et al.*  
14

15 *Respondents.*

3:06-cv-00449-KJD-RAM

ORDER

16 This represented habeas matter under 28 U.S.C. § 2254 comes before the Court on  
17 the petitioner's application (#88) for a certificate of appealability (COA). Petitioner seeks to  
18 appeal: (a) the order and judgment (## 85 & 86) denying Ground 1 on the merits; (b) the  
19 findings, conclusions, and order (#70) dismissing Grounds 3, 4, 5 and 6 as untimely; and (c)  
20 the dismissal by the same findings, conclusions and order of Grounds 2 and 7 on the basis  
21 of procedural default.

22 As to the claims rejected by the district court on the merits, under 28 U.S.C. § 2253(c),  
23 the petitioner must make a "substantial showing of the denial of a constitutional right" in order  
24 to obtain a COA. *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S.Ct. 1595, 1603-04, 146  
25 L.Ed.2d 542 (2000); *Hiivala v. Wood*, 195 F.3d 1098, 1104 (9<sup>th</sup> Cir. 1999). To satisfy this  
26 standard, the petitioner "must demonstrate that reasonable jurists would find the district  
27 court's assessment of the constitutional claim debatable or wrong." *Slack*, 529 U.S. at 484,  
28 120 S.Ct. at 1604.

1 As to claims rejected on procedural grounds, the petitioner must show: (1) that jurists  
2 of reason would find it debatable whether the petition stated a valid claim of a denial of a  
3 constitutional right; and (2) that jurists of reason would find it debatable whether the district  
4 court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct.  
5 1595, 1604, 146 L.Ed.2d 542 (2000). While both showings must be made to obtain a COA,  
6 "a court may find that it can dispose of the application in a fair and prompt manner if it  
7 proceeds first to resolve the issue whose answer is more apparent from the record and  
8 arguments." 529 U.S. at 485, 120 S.Ct. at 1604. Where a plain procedural bar is properly  
9 invoked, an appeal is not warranted. 529 U.S. at 484, 120 S.Ct. at 1604.

10 The application will be granted in part and denied in part.

11 Out of an abundance of caution, a COA will be granted as to the following:

- 12 (a) the rejection (in #85) of Ground 1 on the merits but not, for the  
13 reasons discussed *infra*, as to the denial of an evidentiary hearing  
14 as to that ground;
- 15 (b) the holding (in #70, at 21-27) that Grounds 3, 4, 5 and 6 in the  
16 amended petition do not relate back to the original petition, but  
17 not, for the reasons discussed *infra*, as to petitioner's equitable  
18 tolling argument as to the period between the filing of the original  
19 federal petition and the amended petition; and
- 20 (c) the holding (in #70, at 41-43) that petitioner's mental condition did  
21 not provide a basis for cause excusing the procedural default of  
22 Grounds 2 and 7, but not, for the reasons discussed *infra*, as to  
23 petitioner's remaining arguments seeking to overcome the  
24 procedural bar.

25 The Court remains of the view, however, that its orders as to these grounds and issues  
26 were correctly decided under the current law and applicable standard of review.

27 A COA will be denied as to the remaining issues identified in the application, for the  
28 reasons discussed below.

1       ***Evidentiary Hearing on the Merits of Ground 1***

2       Jurists of reason would not find the district court's denial of an evidentiary hearing (in  
3 #85, at 9 n.6) on the merits of Ground 1 to be debatable or wrong.

4       First, Ground 1 is not a claim that presents issues of fact for an evidentiary hearing.  
5 Ground 1 is a claim of trial error based upon the state trial court's denial of a motion for  
6 mistrial based upon statements by a prosecution witness during her testimony that related to  
7 gang affiliation. The witness' statements in the record either were a basis for a mistrial or they  
8 were not. Petitioner did not identify any specific factual issues for an evidentiary hearing prior  
9 to final disposition on the claim in this Court. He does not identify any specific factual issues  
10 – over and above conclusory boilerplate argument – warranting an evidentiary hearing on this  
11 ground in the COA application.

12       Against this backdrop, petitioner's corollary arguments – that he is entitled to an  
13 evidentiary hearing because he allegedly presented a colorable claim and because the  
14 respondents denied all material allegations other than those found by the state courts – beg  
15 the question. There is no issue to hold an evidentiary hearing on with regard to a claim of trial  
16 error based upon the introduction of allegedly improper evidence. Federal habeas courts do  
17 not hold evidentiary hearings merely as an empty exercise.

18       Second, petitioner's argument that he was not permitted to develop a full factual record  
19 in the state courts is meritless on its face. Petitioner urges that the Nevada fast track  
20 procedure on direct appeal did not permit him to develop additional facts. This argument is  
21 fallacious. The motion for mistrial was brought in the trial court in a state criminal proceeding  
22 where petitioner was represented by counsel. The fast-track rules on a subsequent appeal  
23 did not preclude trial counsel from seeking to present to the state trial court any further – to  
24 this day as-yet unspecified – factual development necessary for adjudication of the motion.  
25 The argument that petitioner was precluded from making a factual record in the state courts  
26 as to this claim is frivolous.

27       A COA therefore will be denied on this issue.

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***Equitable Tolling Subsequent to the Filing of the Original Federal Petition***

Jurists of reason would not find the district court's rejection (in #70, at 28) of petitioner's argument seeking equitable tolling after the filing of the federal petition to be debatable or wrong.

This Court held that petitioner was entitled to equitable tolling up through the filing of the state petition on November 20, 2005, due to a somatoform disorder that impeded his ability to pursue post-conviction relief without active assistance. Petitioner ultimately was able to obtain such active assistance from a cellmate, Derek Costantino. With Costantino's assistance, petitioner filed the state petition on November 20, 2005. Also with Costantino's assistance, petitioner filed the federal petition in this matter on August 3, 2006, less than a year after the filing of the state petition. See #70, at 17-19 (conclusions of law); see also *id.*, at 4-8 (underlying findings of fact).

With regard to the period on and after November 20, 2005, the assisted petitioner filed a state post-conviction petition, pursued an appeal of the denial of that petition in the state supreme court, and filed the August 3, 2006, federal petition. Petitioner's pursuit of both state and federal petitions during this time period demonstrates that he was able to present claims notwithstanding the combination of circumstances that previously had stood in his way. Petitioner must demonstrate a causal relationship between the alleged circumstances that stood in his way and the untimely filing. He clearly cannot do so vis-à-vis any claims that were not timely presented after November 20, 2005. See #70, at 28.

The Court further notes that petitioner was represented by federal habeas counsel on and after December 21, 2006. He cannot viably claim equitable tolling based upon his somatoform disorder during the time that he was represented by counsel. Federal habeas counsel did not file the amended petition until November 2, 2007, well after any *arguendo* remaining untolled time had expired. A COA therefore will be denied on this issue.<sup>1</sup>

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<sup>1</sup> Counsel asserts that petitioner was "not capable of assisting in the identification or litigation of any claims sought to be raised." #88, at 13. There is no evidentiary support for this assertion in the factual record (continued...)

### ***Alleged Improper Handling of 1997 Filing***

Petitioner seeks to pursue an issue on appeal challenging the adequacy of the state time-bar applied to his 2005 petition under N.R.S. 34.726, as to the claims in Grounds 2 and 7, because of an alleged improper handling of a 1997 state court filing by petitioner.

Petitioner filed a petition for production of documents, not a state post-conviction petition, in 1997. The state district court granted the request for production of documents and denied an accompanying motion for counsel. Petitioner filed nothing further in the state district court after the petition for production was granted, and he did not pursue an appeal to the state supreme court after the petition was granted.

This Court held that “[p]etitioner’s continued strained attempt to portray the petition for production instead as a state postconviction petition that was improperly dismissed provides no viable basis for concluding that N.R.S. 34.726(1) did not constitute an adequate state law ground in this case.” Jurists of reason would not find the district court’s rejection of this argument to be debatable or wrong. Petitioner simply is repeating a baseless argument that is directly belied by the record. See #70, at 38; see also *id.*, at 2-3 & 11-15.

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<sup>1</sup>(...continued)

presented in the district court following an evidentiary hearing that was specifically directed to tolling issues. Indeed, the hearing order expressly stated:

The Court has not determined at this juncture whether or not Grounds 1 through 6 and Ground 8 in the first amended petition relate back to the filing of the original petition, given that the timeliness of the original petition is an antecedent threshold issue. The parties accordingly should approach the tolling issues in the evidentiary hearing on the *arguendo* assumption that additional tolling, over and above any tolling established as to the original petition, potentially may be required to render these claims in the first amended petition timely.

#41, at 1. The expert who testified at the evidentiary hearing clearly and expressly did not provide any opinion testimony that petitioner was not competent to assist counsel, at any time. See #70, at 31-32. He instead opined that petitioner was not able due to his somatoform disorder to follow through with the multiple tasks required to pursue post-conviction relief without assistance. This Court similarly made no finding that petitioner was unable to assist counsel. #70, at 18. Petitioner, with assistance, quite clearly has been filing claims and pursuing litigation in state and federal court since November 20, 2005, belying any claim that his somatoform disorder precludes the filing of claims when he has the assistance of another individual to provide direction and organization.

1 Repeatedly stating that a thing is something that it is not does not make it so. Nor  
2 does it present a COA-worthy issue for appeal.

3 A COA therefore will be denied on this issue.

4 ***Alleged Inconsistent Application of N.R.S. 34.726***

5 Petitioner seeks to pursue an issue on appeal challenging the adequacy of N.R.S.  
6 34.726 on the basis that it is inconsistently applied by the state supreme court.

7 Under well-established Ninth Circuit law, the consistency of the state supreme court's  
8 application of N.R.S. 34.726 has been established up through 1996; the petitioner has the  
9 burden of citing apposite case law showing inconsistent application of *this* procedural rule for  
10 time periods thereafter; and, if he fails to do so, the federal court must presume that the state  
11 procedural rule is adequate. See authorities cited in #70, at 36-37.

12 In the present case, petitioner sought to show inconsistent application of N.R.S. 34.726  
13 by citing cases regarding an entirely different procedural rule, the contemporaneous objection  
14 rule. Under established Ninth Circuit law, cases that concern other procedural rules and that  
15 do not discuss the application of the procedural rule barring an untimely post-conviction  
16 petition "are not relevant" to the question of whether N.R.S. 34.726(1) has been consistently  
17 applied. *Moran v. McDaniel*, 80 F.3d 1261, 1270 (9<sup>th</sup> Cir. 1996).

18 Jurists of reason would not find the Court's rejection of this argument to be debatable  
19 or wrong. The argument has no conceivable merit under, and flies in the face of, established  
20 Ninth Circuit authority. See #70, at 35-27. A COA therefore will be denied on this issue.

21 ***Alleged Erroneous Rejection of Cause Argument by the State Supreme Court***

22 Petitioner seeks to pursue an issue on appeal contending that N.R.S. 34.726 cannot  
23 bar his claims because the state supreme court erroneously rejected his claim of good cause  
24 on state post-conviction review.

25 As this Court noted in rejecting this argument, in applying the federal procedural default  
26 doctrine, "the Court is not reviewing the state court's application of state law principles but  
27 instead is applying federal law in determining whether petitioner has demonstrated cause and  
28 prejudice to excuse the procedural default in the state court." #70, at 38 n.19. If petitioner

1 demonstrates cause and prejudice in federal court under federal case law, he overcomes the  
 2 procedural default. If he does not do so, he cannot overcome the procedural default by  
 3 arguing that the state court erroneously rejected his cause argument.<sup>2</sup>

4 Reasonable jurists would not find the rejection of the argument debatable or wrong.  
 5 The argument is redundant and superfluous and does not present a substantial independent  
 6 issue for appeal. A COA therefore will be denied on this issue.

7 ***Ineffective Assistance of Counsel as Cause***

8 Petitioner seeks to pursue an issue on appeal relying upon ineffective assistance of  
 9 counsel to establish cause and prejudice.

10 This Court's reasons rejecting this argument clearly demonstrate that the argument has  
 11 no conceivable merit:

12 In the present case, petitioner seeks to establish cause  
 13 and prejudice due to ineffective assistance of counsel based  
 14 upon the underlying ineffective assistance claims themselves.

15 This argument misses the mark, widely. Grounds 2 and 7  
 16 are claims of ineffective assistance of trial counsel. See  
 17 Conclusion Nos. 24 and 25. A federal habeas petitioner can not  
 18 establish cause and prejudice excusing the procedural default of  
 19 an ineffective assistance claim merely by pointing to the fact that  
 20 the underlying claim itself is an ineffective assistance claim. Such  
 21 a circular argument has absolutely no support in the governing  
 22 case law.

23 Rather, the petitioner must establish not that the underlying  
 24 claim was based upon ineffective assistance of counsel but  
 25 instead that the *default* of the underlying claim in the state court  
 26 was caused by ineffective assistance of counsel. See, e.g.,  
 27 *Coleman*, 501 U.S. at 752, 111 S.Ct. at 2566. The procedural bar  
 28 applied by the Supreme Court of Nevada in this case was based  
 upon the petitioner's failure to file the state post-conviction  
 petition timely. The claims of ineffective assistance of trial  
 counsel presented in Grounds 2 and 7 could not be presented  
 either at trial or on direct appeal, and trial counsel was not

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25 <sup>2</sup>In habeas cases arising in Nevada, the grounds for avoiding a procedural bar in the Nevada state  
 26 courts, such as the state post-conviction time-bar, are substantially the same in the state courts as they are in  
 27 federal court. See, e.g., *Mitchell v. State*, 149 P.3d 33, 36 (Nev. 2006) ("A petitioner can overcome the bar to  
 28 an untimely or successive petition by showing good cause and prejudice."); see also *Robinson v. Ignacio*, 360  
 F.3d 1044, 1052 n.3 (9th Cir. 2004) (recognizing that Nevada's cause-and-prejudice analysis and the federal  
 cause-and-prejudice analysis are nearly identical).



1 charged with the responsibility of pursuing state post-conviction  
 2 relief. Petitioner sought state post-conviction relief *pro se*, such  
 3 that the failure to seek timely post-conviction relief was his own  
 4 failure rather than a failure by counsel. Moreover, even if  
 5 Schneider had been appointed counsel for seeking state post-  
 6 conviction relief, it is well-established law that a petitioner cannot  
 base a claim of cause and prejudice upon an alleged failure of  
 post-conviction counsel because a petitioner has no constitutional  
 right to counsel in the state post-conviction proceedings. *E.g.*,  
*Coleman, supra*.

7 Petitioner's reliance upon ineffective assistance of counsel  
 8 to establish cause for the procedural default resulting from his  
 9 untimely *pro se* filing of his state post-conviction petition is a  
 complete *non sequitur*. An allegation of ineffective assistance of  
 counsel has no bearing upon the issue of cause regarding the  
 procedural default in question in this case.

10 #70, at 38-39 (footnote omitted).

11 Jurists of reason would not find the rejection of this argument to be debatable or wrong,  
 12 as the argument clearly does not present a COA-worthy issue. A COA therefore will be  
 13 denied on this issue.

14 ***Failure to Appoint Counsel and Hold Evidentiary Hearing as Cause***

15 Petitioner seeks to pursue an issue on appeal seeking to establish cause based upon  
 16 the state court's failure to appoint counsel and hold an evidentiary hearing.

17 Jurists of reason would not find the rejection of this argument debatable or wrong.  
 18 There is no constitutional right to appointment of counsel in state post-conviction proceedings.  
 19 The failure to appoint counsel and hold an evidentiary hearing *after* a petition is filed in any  
 20 event clearly cannot excuse the failure to *file* the petition timely. The state court's action on  
 21 a 1997 petition for production – which clearly was not a state post-conviction petition – in  
 22 which the court granted the petition but denied counsel did not constitute a factor that  
 23 thereafter impeded petitioner from pursuing post-conviction relief for the next eight years. Nor  
 24 did petitioner allege in the 1997 petition for production that he needed appointment of counsel  
 25 due to any mental health condition. See #70, at 40-41.

26 Jurists of reason therefore would not find the rejection of this argument to be debatable  
 27 or wrong. A COA accordingly will be denied as to this issue.

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1 IT THEREFORE IS ORDERED that, pursuant to 28 U.S.C. § 2253(c) and Rule 22(b)  
2 of the Federal Rules of Appellate Procedure, petitioner's application (#88) for a certificate of  
3 appealability is GRANTED IN PART and DENIED IN PART, as further specified below.

4 IT FURTHER IS ORDERED that a certificate of appealability is GRANTED as to:

- 5 (a) the rejection of Ground 1 on the merits;
- 6 (b) the holding that Grounds 3, 4, 5 and 6 in the amended petition do  
7 not relate back to the original petition; and
- 8 (c) the holding that petitioner's mental condition did not provide a  
9 basis for cause for the purpose of overcoming the procedural  
10 default of Grounds 2 and 7.

11 IT FURTHER IS ORDERED that a certificate of appealability is DENIED as to:

- 12 (a) the denial of an evidentiary hearing on Ground 1;
- 13 (b) petitioner's claim of equitable tolling as to the period between the  
14 filing of the original federal petition and the amended federal  
15 petition;
- 16 (c) petitioner's challenge to the adequacy of the state time-bar  
17 applied to a 2005 post-conviction petition under N.R.S. 34.726  
18 based upon an alleged improper handling of a 1997 state court  
19 filing by petitioner;
- 20 (d) petitioner's materially unsupported challenge to the adequacy of  
21 N.R.S. 34.726 on the basis that it is inconsistently applied by the  
22 state supreme court;
- 23 (e) petitioner's argument that N.R.S. 34.726 cannot bar his claims  
24 because the state supreme court allegedly erroneously rejected  
25 his claim of good cause on state post-conviction review;
- 26 (f) petitioner's effort to rely upon ineffective assistance of counsel to  
27 demonstrate cause and prejudice for failure to timely file post-  
28 conviction claims of ineffective assistance of trial counsel; and

1 (g) petitioner's argument seeking to establish cause for the untimely  
2 filing of the state petition based upon the state court's failure to  
3 appoint counsel and hold an evidentiary hearing.

4 The matter is postured for transmittal of the appeal by the Clerk of this Court to the  
5 Court of Appeals.

6 DATED: March 31, 2010.

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KENT J. DAWSON  
United States District Judge  
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